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December 19, 2016

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OFFICE OF GENERAL

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FEDERAL ELECTION
COMMISSION

2016 DEC 19 AM 11:35

Re: MUR 7157

Dear Mr. Jordan:

On behalf of Hillary for America and José H. Villarreal in his official capacity as Treasurer ("Respondents"), we submit this letter in response to the complaint filed by Project Veritas Action Fund and James O'Keefe III ("Complainants") on October 20, 2016 (the "Complaint") alleging a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), or Federal Election Commission ("FEC or "Commission") regulations. The Complaint fails to include any facts, which, if proven true, would constitute a violation of the Act.¹ The Commission should accordingly dismiss the Complaint and take no further action.

Factual Background

Complainants claim that Respondents accepted impermissible in-kind contributions "in the form of coordinated expenditures" from a number of third-party organizations.² To support these allegations, the Complaint offers an unauthenticated "transcript" of conversations they surreptitiously recorded, involving agents of Americans United for Change ("AUFC") and Democracy Partners.³ The Complaint provides the Commission with no authenticated, unedited recordings of these conversations that would permit the evaluation of the actual, complete statements in context.⁴ Instead, the Complainants devised the questions themselves, cherry-picked excerpts of responses and presented them out of context, and then used these preferred excerpts to frame the instant Complaint.

Relying on this self-generated, spurious "documentation," Complainants then mount a sweeping coordination claim against Respondents. Complainants claim that Respondents were "materially

¹ See 11 C.F.R. § 111.4(d)(3).

² Compl. at 14.

³ Compl. Ex. A.

⁴ See 11 C.F.R. § 111.4(d)(4) (requiring a complaint to "be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.").

involved with the political messaging of third-party groups,” had “substantial discussion[s]” with third-party organizations, and “participated in weekly calls to determine shared electoral strategy” with third-party organizations.⁵ According to the Complaint, those third-party organizations then “engaged in the production of public communications.”⁶ The Complaint calls this “[o]utside group shared messaging.”⁷

Once the Complaint is shorn of its repeated, conclusory allegations, it presents only a handful of specific allegations that could even potentially involve Respondents, despite its claim of a six-month “undercover” investigation.⁸

- It quotes Americans United for Change’s Scott Foval as saying: “The messaging is what we have to clear. We already made the call over to Brooklyn to get the clearance from the campaign, because they want to do it anyway.”⁹ The Complaint does not say with whom Foval spoke, whether that person actually worked for Respondents, or indeed whether the program ever happened at all.
- It cites a putative email stolen from Respondents’ campaign chair, John Podesta, at the direction of the Russian government,¹⁰ to support the claim that Respondents were involved in the sort of “bird dogging” activities the Complaint purports to describe.¹¹ But the email is spurious, its text does not actually support that claim, and it does not link Respondents to any actual activity alleged by the Complaint.¹²

⁵ Compl. at 5, 8.

⁶ Compl. at 10.

⁷ *Id.*

⁸ *Id.* at 4.

⁹ Compl. at 7; *see also* Compl. Ex. A, at 4.

¹⁰ Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security (Oct. 7, 2016), available at <https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement>; *see also* Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. Times (Dec. 13, 2016), available at http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html?_r=0.

¹¹ Compl. at 8, FN 5.

¹² The Commission should not consider the WikiLeaks material in evaluating the Complaint. To consider the material would further the foreign intelligence objective of undercutting confidence in the U.S. electoral process. *See* Lipton, Sanger & Shane, *supra* note 10. Relying on the material would also encourage future illegal conduct against political actors and disregard serious questions of authenticity. *See* Eric Zorn, *The Inherent Peril in Trusting Whatever WikiLeaks Dumps On Us*, Chicago Tribune (Oct. 13, 2016), available at <http://www.chicagotribune.com/news/opinion/zorn/ct-WikiLeaks-potential-hoax-zorn-perspec-1014-jm-20161013-column.html>.

- It suggests that Respondents “participated in weekly calls to determine shared electoral strategy,” while detailing no actual call, and leaving open the question of whether Respondents even participated at all.¹³

Legal Analysis

The Complaint fails to provide reason to believe that any unlawful coordination occurred. As noted above, the Complaint hinges entirely on spurious videos and transcripts that the Complainants generated themselves and then provided only selectively to the Commission, in apparent contravention of 11 C.F.R. § 111.4(d)(4). Yet even if one were to assume the documentation’s authenticity and completeness, the Complaint would still fail to present a violation by Respondents. It fails to show any nexus between any communication and Respondents’ conduct. Moreover, the Complaint primarily addresses categories of activities to which the coordination rules, on their face, do not apply.

Federal law treats a coordinated communication as an in-kind contribution to a campaign.¹⁴ Each particular communication must satisfy a three-prong test to be considered a coordinated communication: it must (1) be paid for by a person other than a candidate, authorized committee or political party committee with which it is coordinated; (2) satisfy one or more content standards; and (3) satisfy one of several conduct standards.¹⁵ Each prong must be satisfied for the communication to be considered coordinated, and thus an in-kind contribution.

Under Commission regulations, the content prong can be satisfied in one of five ways.¹⁶ The first is to be an “electioneering communication,” which must be publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.¹⁷ The remaining four ways to satisfy the content prong require the communication be a “public communication,”¹⁸ which the Act defines as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising.”¹⁹

The Complaint does not identify any communication that would meet the content prong. It claims that Respondents “participated in weekly calls to determine shared electoral strategy”

¹³ Compl. at 10.

¹⁴ See 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 109.20.

¹⁵ 11 C.F.R. § 109.21.

¹⁶ FEC Matter Under Review 6722 (House Majority PAC), General Counsel’s Report at 4 (Aug. 6, 2013) (citing 11 C.F.R. § 109.21(c)(1)-(5)).

¹⁷ See *id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).

¹⁸ *Id.* (citing 11 C.F.R. § 109.21(c)(2)-(5)).

¹⁹ 52 U.S.C. § 30101(22); 11 C.F.R. §§ 100.26, 109.21(c).

with outside groups, including “discussions about how to shape content and messaging to benefit” Respondents.²⁰ Labeling this “[o]utside group shared messaging,” the Complaint assumes without knowledge or documentation that, “[b]ecause third-party groups engaged in the production of public communications,” the content prong is satisfied.²¹

However, one cannot tell which “public communication” Complainants are referring to, as they fail to point to any specific activity involving Respondents that constitutes a public communication under the Act. Instead, Complainants cite to ambiguous references in the “transcript” of unspecified political activity by “numerous third-party groups.”²² The Complaint also alludes to plans to “have third-party groups launch protests at political events” without naming a specific group that is responsible.²³ Because the Complaint alleges no public communication in which Respondents actually participated, there can be no reason to believe that Respondents violated the Act.²⁴

Complainants also fail to show that the payment prong has been satisfied. No facts are provided in the Complaint to suggest that a third party incurred expenses to create a public communication. Instead, the Complaint cites to a vague conversation referencing a “budget” and concludes that the payment prong has been satisfied.²⁵

Finally, the Complaint presents no facts to show that Respondents met the conduct prong as to any actual communication. It claims repeatedly that a wide range of communications “were directed, controlled or puppeteered by Respondents.”²⁶ But this is rank speculation, and the Commission has refused to entertain similarly sweeping conspiracy theories in the past.²⁷ For example, in MUR 5754, it was not enough for the complaint simply to say that a non-party, non-candidate group “made no secret of its ongoing communications with Democratic party officials.”²⁸ Rather, the complaint had to connect the supposed discussions to the alleged

²⁰ Compl. at 10.

²¹ *Id.*

²² Compl. at 7.

²³ Compl. at 10.

²⁴ The Commission’s Office of General Counsel has consistently recommended dismissal of complaints alleging that communications other than “public communications” sponsored by third parties were illegal contributions. *See, e.g.*, FEC Matter Under Review 6477 (Right Turn USA), First General Counsel’s Report (Dec. 27, 2011); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress), First General Counsel’s Report (Feb. 5, 2013); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel’s Report (Sept. 17, 2013); FEC Matter Under Review 6722 (House Majority PAC), First General Counsel’s Report (Aug. 6, 2013). In each of these matters, the Commission has unanimously voted to dismiss the complaints.

²⁵ Compl. at 13.

²⁶ Compl. at 3.

²⁷ *See, e.g.*, FEC Matter Under Review 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis of Alleged Coordination at 3-4.

²⁸ *Id.*

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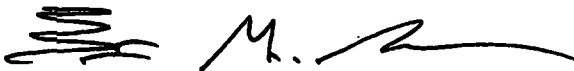
coordinated communications, which it did not do.²⁹ Similarly, this Complaint fails to provide any connection between Respondents and any actual "public communication," and so for this reason also, the Commission should find no reason to believe a violation occurred.

Conclusion

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.³⁰ For claims of coordination, the Commission requires an even stronger showing: that Complainant provide "probative information of coordination."³¹ Additionally, the Commission has made clear that "unwarranted legal conclusions [drawn] from asserted facts" or "mere speculation" are *not* sufficient to find reason to believe that Respondents violated the Act.³² Here, Complainants rely exclusively on speculation and unwarranted legal conclusions to allege Respondents have violated the Act. Accordingly, we request the Commission find no reason to believe Respondents committed any violation of the Act and dismiss this matter immediately.

We appreciate the Commission's consideration of this response.

Very truly yours,



Marc E. Elias
Brian G. Svoboda
Courtney Weisman
Counsel to Respondents

²⁹ *Id.*

³⁰ 11 C.F.R. § 109.21(a).

³¹ FEC Matter Under Review 5754, *supra* note 27.

³² FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).